Supreme Court, U.S.
F I L E D
OCT 15 1996
CLERK

No. 96-400

In The

Supreme Court of the United States

October Term, 1996

LYNN M. PAULSEN,

Petitioner,

vs.

BEYOND, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT E. SHEEDER
Counsel of Record
JASON E. WINFORD
DAVID E. SLOVENSKY
JENKENS & GILCHRIST, P.C.
Attorneys for Respondent
1445 Ross Avenue
Suite 3200
Dallas, Texas 75202
(214) 855-4500

9765
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

Respondent Beyond, Inc. objects to Petitioner's Questions Presented for Review on the basis that they are argumentative, repetitive, and are improperly expressed in a manner that mischaracterizes the facts of the case. Respondent therefore respectfully submits that the Questions Presented for Review in the Petition should read as follows:

1. Did the Fifth Circuit err in holding that Petitioner failed to create a fact issue that she is "disabled" under the Americans with Disabilities Act?

2. Does the Fifth Circuit's requirement that a Title VII plaintiff must, to avoid summary judgment, create a material fact issue, not only that the employer's explanation for the employment action was false, but also that the employer intentionally discriminated against the plaintiff, conflict with this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)?

LIST OF PARTIES

The Petitioner is Lynn M. Paulsen.

The Respondent is Beyond, Inc. Banyan Systems Incorporated is the successor-in-interest to Beyond, Inc. Nihon Banyan Systems is a non-wholly owned subsidiary of Banyan Systems Incorporated. There are no other parent companies or non-wholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Statement of Jurisdiction	1
Statutory and Regulatory Provisions	1
Statement of the Case	1
A. Course of Proceedings and Disposition of the Case Below.	2
B. Statement of Facts	3
Reasons for Denying the Writ	8
I. Petitioner's claim of disability discrimination does not merit review by the Supreme Court.	9
A. The Fifth Circuit's decision is consistent with Supreme Court precedent and the applicable statutes and regulations.	9
B. The Fifth Circuit's decision does not conflict with the decisions of other Courts of Appeals.	15

Contents

Page

C. Petitioner's asserted errors do not warrant review by the Supreme Court. 16

II. Petitioner's claim of sex discrimination does not merit review by the Supreme Court. 17

A. The Fifth Circuit's decision is consistent with *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), and is not in substantial conflict with decisions of other courts of appeals. 17

B. This case does not merit review because Respondent is entitled to summary judgment even under the standard urged by Petitioner. 22

Conclusion 24

TABLE OF CITATIONS

Cases Cited:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) 13

Bodenheimer v. PPG Industries, Inc., 5 F.3d 955 (5th Cir. 1994) 17, 18, 19, 20, 23

Bolton v. Scrivner, Inc., 36 F.3d 939 (10th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1104, 130 L. Ed. 2d 1071 (1995) 15

Contents

	Page
Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)	19
Davis v. Chevron U.S.A., Inc., 14 F.3d 1082 (5th Cir. 1994)	13
Dutcher v. Ingalls Shipbuilding, 53 F.3d 723 (5th Cir. 1995)	10, 15
Ellison v. Software Spectrum, Inc., 85 F.3d 187 (5th Cir. 1996)	10, 11, 15
Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986)	15
Hamm v. Runyon, 51 F.3d 721 (7th Cir. 1995)	15
Isenbergh v. Knight-Ridder Newspaper Sales, Inc., __ F.3d __, 1996 WL 531799 (11th Cir. Sept. 19, 1996)	20, 22
Kelly v. Drexel University, 94 F.3d 102 (3d Cir. 1996)	15
MacDonald v. Delta Air Lines, Inc., 94 F.3d 1437 (10th Cir. 1996)	15
Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)	13
Nelson v. Boatmen's Bancshares, Inc., 26 F.3d 796 (8th Cir. 1994)	20

Contents

Page

Ray v. Glidden Co., 85 F.3d 227 (5th Cir. 1996) 15

Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996) 17, 18, 19, 20, 21, 22, 23

Rogers v. International Marine Terminals, Inc., 87 F.3d 755 (5th Cir. 1996) 15

School Board of Nassau County, Fla. v. Arline, 408 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987) 9, 10

Smith v. Stratus Computer, Inc., 40 F.3d 11 (1st Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1958, 131 L. Ed. 2d 850 (1995) 20

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993) ..... i, 17, 18, 19, 20, 21, 22

Taylor v. United States Postal Service, 946 F.2d 1214 (6th Cir. 1991) 16

Theard v. Glaxo, Inc., 47 F.3d 676 (4th Cir. 1995) 20

Thomas v. N.A. Chase Manhattan Bank, 994 F.2d 236 (5th Cir. 1993) 13

Tyndall v. National Education Centers, Inc., 31 F.3d 209 (4th Cir. 1994) 14

United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983) 21

Contents

	Page
Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994)	20, 21
Wooten v. Farmland Foods, 58 F.3d 382 (8th Cir. 1995)	15
Statutes Cited:	
28 U.S.C. § 1254(1)	1
42 U.S.C. § 12102(2)	10
42 U.S.C. § 12102(2)(C)	10
Rules Cited:	
Federal Rule of Civil Procedure 50	18, 22
Federal Rule of Civil Procedure 56	18, 22
Supreme Court Rule 10	8, 9, 16
Supreme Court Rule 14.1(g)	3
Other Authorities Cited:	
Malamud, Deborah C., *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229 (1995)	21
29 C.F.R. § 1630.2(1)(3)	1, 10

Contents

	Page
29 C.F.R. § 1630.2(j)(2)	1, 11
29 C.F.R. § 1630.2(j)(3)	1
29 C.F.R. § 1630.2(j)(3)(i)	11
29 C.F.R. § 1630.2(j)(3)(ii)	11

APPENDIX

Appendix A — Relevant Regulations 1a

TO THE UNITED STATES SUPREME COURT:

BEYOND, INC. ("Beyond") files this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, asking this Court to deny Lynn M. Paulsen's ("Paulsen") Petition for Writ of Certiorari ("Petition") to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on June 18, 1996. In support of this request, Beyond respectfully shows the Court as follows:

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the decision of the United States Court of Appeals for the Fifth Circuit entered on June 18, 1996.

STATUTORY AND REGULATORY PROVISIONS

In addition to the statutory provisions set forth in the Petition, the following regulations are relevant: (a) 29 C.F.R. § 1630.2(l)(3); (b) 29 C.F.R. § 1630.2(j)(2); and (c) 29 C.F.R. § 1630.2(j)(3). The text of the regulations are set forth in the Appendix hereto.

STATEMENT OF THE CASE

Beyond objects to Paulsen's statement of the decisions of the District Court and the Court of Appeals, in that it is argumentative and selectively refers to the courts' reasons for their decisions. The opinions of the District Court (Petition App. A-24 - A-53) and the Court of Appeals (Petition App. A-1 - A-23), which are reprinted in their entirety in the Appendix to the Petition, should be consulted for the reasons supporting their respective decisions. Beyond respectfully submits the

following statement of the Course of Proceedings and Disposition of the Case Below:

A. Course of Proceedings and Disposition of the Case Below.

Paulsen filed her Original Complaint, alleging sex and disability discrimination, in the United States District Court for the Eastern District of Texas, Sherman Division, on February 16, 1994. (R. 1-6). On October 17, 1994, Beyond filed its Motion for Summary Judgment. Paulsen filed her Response and Brief in Opposition to Beyond's Motion for Summary Judgment on November 3, 1994. (R. 636-59).

On November 17, 1994, Beyond filed its Reply Brief in Support of its Motion for Summary Judgment and its Objections and Motion to Strike Summary Judgment Evidence and Supporting Memorandum. (R. 811-20, 922-36). On November 30, 1994, Paulsen filed her Response to Beyond's Reply Brief and her Response to Beyond's Objections and Motion to Strike. (R. 937-42, 943-50). On January 11, 1995, the District Court granted in part and denied in part Beyond's Motion to Strike Summary Judgment Evidence, striking portions of the affidavits submitted in support of Paulsen's Response. (R. 1046-52).

On January 12, 1995, the District Court issued an order granting Beyond's Motion for Summary Judgment with respect to both of Paulsen's discrimination claims. (R. 1053-70). The District Court held that: (1) as to her claim of sex discrimination, Paulsen failed to create a fact issue that her discharge was motivated by discriminatory intent, and (2) as to her claim of disability discrimination, Paulsen failed to present direct evidence of discrimination, failed to create a fact issue that she qualified as a "disabled" person under the Americans

with Disabilities Act ("ADA"), and failed to create a fact issue that her discharge was motivated by discriminatory intent. (R. 1053-70). Final judgment was entered by the District Court on January 12, 1995. (R. 1071). Paulsen filed her Notice of Appeal on February 3, 1995. (R. 1072-73).

On June 18, 1996, the United States Court of Appeals for the Fifth Circuit affirmed summary judgment for Beyond, holding that: (1) as to her claim of sex discrimination, Paulsen failed to create a material fact issue that the reason for her termination was sex discrimination, and (2) as to her claim of disability discrimination, Paulsen failed to create a material fact issue that she was "disabled" under the ADA. (Petition App. A-1 - A-23). Paulsen filed her Petition for Writ of Certiorari on September 13, 1996.

B. Statement of Facts

Beyond objects to Paulsen's statement of facts because it fails to set forth all the facts material to consideration of the questions presented as required by Supreme Court Rule 14.1(g). Therefore, Beyond submits the following Statement of Facts:

Paulsen is a former employee of Beyond. At the time Paulsen was hired, Beyond was a start-up company involved in the manufacture, marketing and sale of electronic mail products. (R. 141-42). During her pre-employment interviews — including her interview with Beyond President Charles Digate — Paulsen informed Beyond that she had previously suffered from cancer, had undergone surgery and was unable to have children. (R. 113-15). However, Paulsen admits that she was not, and is not, disabled by her prior cancer and surgery. (R. 283).

In September of 1991, with full knowledge of Paulsen's prior cancer and surgery, Beyond hired Paulsen as a Regional Sales Manager in Dallas, Texas. (R. 121-22). As a Regional Sales Manager, Paulsen's job duties included sales and regional office responsibilities, generating an assigned quota of sales revenue, servicing and developing large accounts, and developing relationships with resellers of Beyond's products. (R. 122).

Throughout her entire employment with Beyond, Paulsen had significant performance problems. Specifically, Paulsen was criticized for her failure to meet her sales quota. In 1992, Paulsen was assigned a sales quota of $600,000. (R. 187-88, 434). It is undisputed that Paulsen failed to attain her 1992 quota. (R. 165-69). Moreover, Paulsen admits that she was criticized for low sales. (R. 168-69, 179-80).

Paulsen had numerous problems documenting and paying her business expenses. Paulsen was issued a corporate American Express card for charging her business expenses, but American Express cancelled the card shortly after its issuance because she failed to timely pay the bills. (R. 125-27). Paulsen was specifically criticized for having her American Express card cancelled. (R. 127-30).

In addition, Paulsen was required to submit written expense reports on a weekly basis. (R. 159, 161-62). However, Paulsen repeatedly failed to submit her expense reports timely, and she was criticized for this failure on at least two (2) occasions. (R. 162-63).

Paulsen's supervisors also required her to submit sales forecasts of pending sales prospects and potential future revenue on a monthly or semi-monthly basis. (R. 170-73). Paulsen was repeatedly criticized by her supervisors for untimely and inaccurate sales forecasts. (R. 173-76).

Furthermore, several customers complained to Beyond's management about Paulsen's demeanor and work performance. (R. 152-55, 517-18). Paulsen was also criticized for being unresponsive and not returning phone calls. (R. 147, 218).

Near the end of 1992, Mike Allen, Vice President of Sales, determined that Paulsen's job performance was unsatisfactory and recommended that she be replaced. (R. 511). However, Beyond's President Charles Digate refused to approve replacing Paulsen at that time due to her relationship with Texas Instruments, a potential customer. (R. 511).

In January of 1993, Paulsen assisted Beyond in closing a large sale to Texas Instruments. Paulsen was the only sales representative that received credit for the sale and, as a result, she exceeded her monthly sales quota for January of 1993. (R. 223-24). However, Paulsen did not achieve her monthly quota in any other month in 1993. (R. 224, 435-72). Furthermore, Paulsen's revenue attainment fell far below her projections in her monthly forecasts. (R. 285-87). Paulsen's revenue numbers steadily decreased after January of 1993, and she failed to attain her $77,000 monthly quota (*see* R. 443) in February and March of 1993 or her $83,000 monthly quota in April of 1993. (R. 473). Indeed, after January of 1993, Paulsen was second lowest among all Regional Sales Managers in revenue attainment. (R. 473).

As a result of Paulsen's continued unsatisfactory performance and her weak sales forecasts, in May of 1993 Mike Allen and Charles Digate decided to replace Paulsen. (R. 511-13). On June 18, 1993, Mike Allen engaged the services of a management recruiter, Mr. Craig Millard, to locate a replacement for Paulsen. (R. 521-22, 559-60, 569-71, 579). It is undisputed that, at the time the job search was commenced, Mike Allen specifically informed Mr. Millard that Beyond

wanted to replace Paulsen due to her lack of performance and customer credibility, and that Paulsen was to be discharged. (R. 569-70, 580, 782).

After initiating the job search for her replacement, on June 23, 1993, Mike Allen went to Dallas for a meeting with Paulsen. (R. 522, 290-92). During this meeting, Mike Allen discussed numerous shortcomings in Paulsen's performance. (R. 527-37, 546-47). Paulsen admits that Mr. Allen discussed her performance during this meeting. (R. 669-70).

Subsequently, on July 26, 1993, Mike Allen interviewed five prospective replacements for Paulsen. (R. 543-45, 565-67, 573-76, 583-87). On August 26, 1993, Roger Moore received an offer of employment. (R. 496).

In the meantime, Paulsen failed to meet her minimum level of monthly revenue attainment for June and July of 1993. (R. 294). However, in early August of 1993, Paulsen informed Beyond that she was severely ill and could not work. Paulsen does not recall physically reporting in to Beyond's office any time after August 5, 1993. (R. 295, 306). Despite the fact that Beyond had already found a replacement, Beyond decided not to discharge Paulsen at this time, due to her illness. (R. 496).

On September 10, 1993, Paulsen sent an e-mail message to Mike Allen, informing him that she was scheduled for surgery but that the surgery had to be postponed. This e-mail message provided no definite date for her return. (R. 311, 477).

Effective September 15, 1993, Mike Allen was demoted and replaced as Vice President of Sales, based upon his failure to meet minimum revenue requirements. Paul Guerin then assumed the position of Vice President and became Paulsen's supervisor. (R. 504-06, 599-600).

On September 17, 1993, Paulsen sent a letter to Jeff Kalowski, Beyond's CFO, inquiring about disability benefits. (R. 319-25, 478-84). This letter did not state when — or if — Paulsen would be returning to work. (R. 319-25, 478-84).

On September 30, 1993, Mike Allen and Lynn Paulsen had a telephone conversation concerning the status of Paulsen's business and her health. (R. 272). According to Paulsen, during this conversation, Mr. Allen stated: "You used to have cancer, didn't you? Aren't you afraid it's going to come back?" (R. 272).

On October 5, 1993, Beyond reached an agreement to employ Roger Moore as a Regional Sales Manager in Dallas, Texas. (R. 599-601). Paulsen learned of her impending replacement as a result of rumors from Beyond employees and an e-mail from an unidentified Beyond employee. (R. 328-29, 374).

On October 7, 1993, Paul Guerin telephoned Paulsen to determine her status. (R. 273, 275-76, 338-40, 598-99). During this conversation, Mr. Guerin expressed concern about Paulsen's condition, and allegedly asked about her prior cancer and if she was worried that it might recur. (R. 275-76). Mr. Guerin made this inquiry because Paulsen had previously indicated that she was not certain if her illness resulted from her prior cancer or from scar tissue resulting from her prior surgery. (R. 616-17).

On October 8, 1993, Paulsen confronted Paul Guerin about being replaced, and then informed him that she was feeling better and had been released to return to work. (R. 605). Subsequently, Mr. Guerin discussed Paulsen's status with Charles Digate. Mr. Guerin and Mr. Digate determined that,

rather than return Paulsen to her sales territory, the company should offer Paulsen a mutual separation agreement. (R. 605-06). The reasons for offering Paulsen a mutual separation agreement were her failure to meet her sales quota, her weak sales forecasts, her poor administrative skills, and her continued nonresponsiveness. (R. 497, 617-19).

On Sunday, October 10, 1994, Paulsen was informed of the company's decision. (R. 606, 353-58). Subsequently, Paulsen had several conversations with Beyond's management concerning the terms of her separation agreement, but no agreement could be reached. (R. 342, 560-62). Paulsen was never told that she was being discharged because she had cancer or because she may have cancer in the future. (R. 275).

Paulsen is aware of no other female employees of Beyond who were discriminated against because of their sex. (R. 268-89, 552). Moreover, in 1993, Beyond discharged four male employees for the same reasons that Paulsen was discharged.

Paulsen is aware of no other employees that Beyond discriminated against because of a disability. (R. 552). Moreover, Paulsen's replacement, Roger Moore, was never deposed, and no evidence was submitted concerning whether Mr. Moore was disabled. Furthermore, Paulsen offered no evidence concerning whether any of the other employees discharged for unsatisfactory performance and low sales were disabled. In addition, two other employees of Beyond — Mr. Mark Barrett and Mr. Thomas Fraser — missed extended work time due to illness or injury and were not discharged. (R. 262-67).

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10 provides that "[a] petition for writ of certiorari will be granted only for compelling reasons."

There are no compelling reasons for granting this Petition on any of the issues raised by Petitioner. Although not an exhaustive list of the reasons for granting certiorari, Rule 10 lists three characteristics of cases justifying review. Petitioner's case meets none of these criteria. Furthermore, Petitioner's asserted errors consist essentially of factual disputes or involve the application of properly stated rules of law, which are not errors warranting review by the Supreme Court.

I.

PETITIONER'S CLAIM OF DISABILITY DISCRIMINATION DOES NOT MERIT REVIEW BY THE SUPREME COURT.

A. The Fifth Circuit's decision is consistent with Supreme Court precedent and the applicable statutes and regulations.

Paulsen's claim that the Fifth Circuit's decision conflicts with this Court's decision in *School Board of Nassau County, Fla. v. Arline*, 408 U.S. 273, 107 S. Ct. 1123, 94 L. Ed. 2d 307 (1987), is incorrect. The Court in *Arline* held that a person suffering from tuberculosis can be a handicapped person under the Rehabilitation Act of 1973. 408 U.S. at 281, 107 S. Ct. at 1127. Although *Arline* indicated, as Paulsen notes, that a person could be a handicapped individual under the Rehabilitation Act if he or she is regarded as having an impairment (such as cancer) that substantially limits a major life activity (such as working), 408 U.S. at 282-83 & n.10; 107 S. Ct. at 1128-29 & n.10, *Arline* did not address what evidence is sufficient to raise a fact issue that an individual is regarded as having an impairment that substantially limits a major life activity, under either the Rehabilitation Act or the ADA. Thus, *Arline* did not address the

issue that was before the Fifth Circuit. However, in accordance with *Arline*, the Fifth Circuit correctly recognized that Paulsen would be "disabled" under the ADA if she could show that Beyond regarded her as having cancer that substantially limited her in the major life activity of working. The Fifth Circuit properly held, however, that Paulsen must actually present sufficient evidence to create a fact issue that Beyond regarded her as having cancer that substantially limited her in the major life activity of working, a requirement this Court did not dispense with in *Arline*.

The Fifth Circuit's holding is consistent with the ADA and its regulations. Although cancer may be an "impairment" under the ADA, to establish that one is "disabled" one must show that the impairment *substantially limits* a *major life activity*. 42 U.S.C. § 12102(2); *see Ellison v. Software Spectrum, Inc.*, 85 F.3d 187 (5th Cir. 1996) (holding that plaintiff with cancer nonetheless failed to create a fact issue that she was "disabled" under the ADA); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995). Because Paulsen does not contend that she actually has an impairment (*i.e.*, cancer), she had to create a material fact issue that Beyond treated her as having a substantially limiting impairment — that is, that Beyond treated her as if she were suffering a recurrence of cancer that substantially limited a major life activity. 42 U.S.C. § 12102(2)(C); 29 C.F.R. § 1630.2(l)(3). Paulsen does not dispute that this is the requirement she had to meet.

Neither the summary judgment evidence relied on by Paulsen, nor anything else in the summary judgment record, raises a fact issue that Beyond treated Paulsen as having a recurrence of cancer, or that the supposed recurrence of cancer *substantially limited* the major life activity of working. Although the ADA does not define "substantially limits," the EEOC's regulations provide significant guidance. In

determining whether an impairment "substantially limits" a major life activity one must consider: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2). With respect to the major life activity of "working," the regulations state:

> The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

29 C.F.R. § 1630.2(j)(3)(i). The regulations also state that in determining whether someone is substantially limited in the major life activity of working, one must also consider the geographic area to which the person has access and the number and types of jobs in that geographical area from which the person is also disqualified because of the impairment. 29 C.F.R. § 1630.2(j)(3)(ii). Clearly, the ADA and the regulations require far more than merely showing that an individual's ability to work is affected to establish that the major life activity of working is *substantially limited*. *Ellison*, 85 F.3d at 191 ("Obviously, her ability to work was affected; but, as reflected in the above-quoted statute and regulations, far more is required to trigger coverage under § 12102(2)(A).").

Paulsen failed to produce any summary judgment evidence as to what Beyond perceived to be the nature and severity of her

supposed recurrence of cancer, what Beyond perceived to be its duration or expected duration, or whether Beyond perceived it to have a permanent or long term impact. Nor did Paulsen produce any evidence that Beyond perceived her to be significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities, as opposed to merely being unable to perform one particular job.

Paulsen contends that Paul Guerin believed she was too sick to return to work, and such a belief creates a fact issue that Beyond treated her possible recurrence of cancer as substantially limiting a major life activity. Although Paulsen does not point out in her Petition what portions of Guerin's deposition indicate that he believed Paulsen was too sick to return to work, a review of Guerin's deposition does not reveal any probative evidence that Guerin believed Paulsen was unable to return to work because she was having a recurrence of cancer or that he therefore believed she was substantially limited in the major life activity of working. In his deposition, Guerin indicated that *while Paulsen was out on disability leave* he did not know when she would be able to return to work, but that he did not anticipate she would be able to return for an undetermined period of time based on information that Paulsen and Mike Allen had given him. However, as the Fifth Circuit correctly indicated, even if Guerin believed Paulsen was presently unable to return to work, there is no evidence that he believed Paulsen was suffering from a recurrence of the cancer she had prior to her employment with Beyond, nor is there any evidence that Beyond appreciated the gravity of her prior cancer such that Beyond believed it to have substantially limited the major life activity of working. (Petition App. A-22).

Paulsen's reliance on Guerin's vague and nonspecific

belief at one point (while Paulsen was on disability leave) that she would be unable to return to work at the present time is not the type of specific factual evidence required to raise a genuine issue of material fact that she was substantially limited in the major life activity of working. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986) (stating that the nonmovant must do more than show some metaphysical doubt as to the material facts, but must come forward with specific facts); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986) (stating that evidence that is "merely colorable," or "not significantly probative," is insufficient to create a material fact issue).

Paulsen ignores the undisputed summary judgment evidence establishing that Beyond neither regarded her as being disabled nor discharged her because it regarded her as being disabled. In her Petition Paulsen relies solely on one isolated portion of the summary judgment evidence, and takes that evidence out of context in an attempt to argue that she has created a material fact issue. However, in determining whether a genuine issue of material fact exists courts must consider the entire summary judgment record, and cannot consider isolated portions of evidence out of context. *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1086 (5th Cir. 1994); *Thomas v. N.A. Chase Manhattan Bank*, 994 F.2d 236, 241 (5th Cir. 1993); *see also Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356 (indicating that courts must consider the record taken as a whole, and must consider evidence in its factual context, rather than in isolation, in determining whether there is a genuine issue for trial).

It is undisputed that, prior to her discharge, Paulsen informed Beyond she was healthy and ready to return to work. This evidence indicates that Beyond regarded Paulsen as healthy — not disabled — at the time of her discharge. Indeed,

there is no evidence suggesting that Beyond did not regard Paulsen as healthy and able to work after she so informed Guerin, or that Beyond had any reason to perceive her as anything but healthy and able to work. Thus, the only reasonable inference is that at the time of her discharge Beyond believed Paulsen to be healthy and able to work. The undisputed summary judgment evidence also shows that Beyond's management — including its president, Charles Digate — was aware of Paulsen's history of cancer prior to hiring her, and that Paulsen actually emphasized her prior cancer in her interview. This undisputed evidence creates an inference that Beyond did not later discharge Paulsen on the basis of her prior cancer or a recurrence thereof, real or perceived. *Tyndall v. National Education Centers, Inc.*, 31 F.3d 209, 215 (4th Cir. 1994).

Although Paulsen cites on two alleged inquiries by Guerin and Mike Allen concerning her illness, these inquiries were properly held by the District Court to constitute nothing more than legitimate inquiries into Paulsen's general welfare, which do not raise an inference of discrimination. *See Tyndall*, 31 F.3d at 215. To the extent the inquiries were anything other than expressions of personal concern, they were clearly designed to serve a legitimate business purpose (*i.e.*, to determine when, or if, Paulsen would be available to return to work), as they were made at about the time Paulsen was seeking disability benefits but had not indicated when she might be able to return to work. And, as the District Court correctly noted, no discriminatory intent can be inferred since neither Allen nor Guerin made any further inquiries into Paulsen's condition and made no statements whatsoever concerning whether Paulsen could or should continue working with her condition. (Petition App. A-48).

The evidence relied on by Paulsen in her Petition — that Guerin allegedly believed her to be too sick to work — when

considered in the context of the undisputed summary judgment evidence taken as a whole, fails to create a fact issue that Beyond terminated Paulsen because it regarded her as having an impairment that substantially limited a major life activity. As the Fifth Circuit correctly stated, "Paulsen simply does not establish . . . in what way Beyond treated Paulsen as if she suffered from any illness that had the requisite limiting effects to trigger ADA coverage." (Petition App. A-22). Because there is an absolute paucity of specific facts showing that Beyond regarded Paulsen as having a recurrence of cancer that substantially limited a major life activity, the Fifth Circuit properly affirmed summary judgment for Beyond consistent with the ADA and the regulations thereunder.

B. The Fifth Circuit's decision does not conflict with the decisions of other Courts of Appeals.

The Fifth Circuit's decision is consistent with decisions of other courts of appeals as well as other decisions of the Fifth Circuit. *See, e.g., MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437 (10th Cir. 1996); *Kelly v. Drexel University*, 94 F.3d 102, 108-09 (3d Cir. 1996); *Rogers v. International Marine Terminals, Inc.*, 87 F.3d 755, 760 (5th Cir. 1996); *Ray v. Glidden Co.*, 85 F.3d 227, 229-30 (5th Cir. 1996); *Ellison*, 85 F.3d at 192-93; *Wooten v. Farmland Foods*, 58 F.3d 382, 385-86 (8th Cir. 1995); *Dutcher*, 53 F.3d at 726-27; *Hamm v. Runyon*, 51 F.3d 721, 724-26 (7th Cir. 1995); *Bolton v. Scrivner, Inc.*, 36 F.3d 939, 942-44 (10th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1104, 130 L. Ed. 2d 1071 (1995); *Forrisi v. Bowen*, 794 F.2d 931, 934-35 (4th Cir. 1986). The courts in each of these cases affirmed summary judgment for the defendant on the ground that the plaintiff failed to create a fact issue that he or she was regarded as having an impairment that substantially limited a major life activity, as required under the applicable statutes and regulations.

The decision below does not conflict with *Taylor v. United States Postal Service*, 946 F.2d 1214 (6th Cir. 1991), cited by Paulsen in her Petition. In *Taylor*, the evidence showed that in refusing to hire Taylor as a distribution clerk, the United States Postal Service believed, based on the results of a medical exam conducted by the Postal Service, that he would be physically unable to perform the required job activities due to degenerative disease in his back and knees. *Id.* at 1214-15. The Sixth Circuit held the evidence established that the Postal Service regarded Taylor as having an impairment that substantially limited his ability to work. *Id.* at 1218. Paulsen, unlike Taylor, failed to present evidence sufficient to support a finding that Beyond believed her to have an impairment (*i.e.*, cancer) that substantially limited her ability to work. The different results in this case and in *Taylor* are due to dissimilar facts, not to conflicting interpretations of the applicable law.

C. Petitioner's asserted errors do not warrant review by the Supreme Court.

In addition, to the extent Paulsen's assertion of error has any validity (which Beyond denies), such error concerns what are essentially factual disputes (*i.e.*, the inferences to be drawn from the summary judgment evidence) or the misapplication of a properly stated rule of law (*i.e.*, the standard for coverage under the ADA). These types of asserted error rarely warrant review by this Court under Supreme Court Rule 10.

II.

PETITIONER'S CLAIM OF SEX DISCRIMINATION DOES NOT MERIT REVIEW BY THE SUPREME COURT.

A. The Fifth Circuit's decision is consistent with *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), and is not in substantial conflict with decisions of other courts of appeals.

Paulsen argues in her Petition that the Fifth Circuit, by relying on its previous opinion in *Bodenheimer v. PPG Industries, Inc.*, 5 F.3d 955 (5th Cir. 1994), misapplied this Court's opinion in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742, 125 L. Ed. 2d 407 (1993). The Fifth Circuit, both in *Bodenheimer* and as further explained in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996) (en banc), correctly understood and applied *Hicks*. Likewise, the Fifth Circuit's opinion below is consistent with *Hicks*.

Despite Paulsen's contention to the contrary the decision below does not conflict with *Hicks* because this Court in *Hicks* did not address the issue raised by Paulsen. The Court in *Hicks* held that a Title VII plaintiff is not entitled to judgment as a matter of law simply because she proves her prima facie case and then shows that the employer's proffered reasons for her discharge are false. *Hicks*, 113 S.Ct. at 2746. However, the Court did not address whether a plaintiff would always be able to avoid summary judgment for the employer if, in addition to the prima facie case, the evidence is sufficient to allow the jury to disbelieve the employer's proffered reasons for the adverse employment action. That question simply was not before the Court in *Hicks*. Indeed, the *Hicks* case had been fully tried before the district judge. Thus, in reviewing the District Court's

judgment, this Court in *Hicks* did not rule, nor did it have the opportunity to rule, on the application of Rule 56 (summary judgment) or Rule 50 (judgment as a matter of law in jury trials) in employment discrimination cases. The Fifth Circuit in *Bodenheimer* (Rule 56 motion for summary judgment) and in *Rhodes* (Rule 50 motion for judgment as a matter of law) squarely addressed the issue raised by Paulsen and correctly resolved it consistent with this Court's precedents. Therefore, Paulsen's contention that the Fifth Circuit's decision below conflicts with this Court's decision in *Hicks*, and that *Hicks* necessarily precludes summary judgment for Beyond, is incorrect and, to say the least, disingenuous.

To the contrary, *Bodenheimer*, *Rhodes*, and the Fifth Circuit in this case correctly applied the standards governing motions for summary judgment and motions for judgment as a matter of law to employment discrimination cases. As explained in *Hicks*, once the employer has met its burden of articulating legitimate, non-discriminatory reasons for the employment action, which Paulsen has not challenged that Beyond has done in this case, the plaintiff then bears the burden of proving that the employer's proffered reason was a "pretext for discrimination" — that is, the plaintiff must show "*both* that the reason was false, *and* that discrimination was the real reason." *Hicks*, 113 S. Ct. at 2751.

Although *Hicks* was addressing a Title VII plaintiff's ultimate burden of proof at trial, *Hicks* is instructive here because it is the plaintiff's ultimate burden at trial that necessarily defines the scope of the inquiry at the summary judgment stage. As this Court explained in *Celotex Corp. v. Catrett*, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's

case, and on which that party will bear the burden of proof at trial." 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). Because Paulsen's burden at trial would be to prove *both* that Beyond's proffered reasons were false *and* that sex discrimination was the real reason, in order to avoid summary judgment she must make a showing sufficient to establish, not only that Beyond's reasons were false, but *also* that Beyond intentionally discriminated against her because of her sex. This is exactly what the Fifth Circuit in *Bodenheimer*, *Rhodes*, and in this case below held, and this required showing is consistent with, and indeed compelled by, *Hicks* and prior Supreme Court precedents.

Paulsen would apparently interpret *Hicks* to mean that, in *all* cases, rejection of the employer's proffered reasons for the employment action will *always* support a finding of intentional discrimination, and consequently that raising a fact issue as to the employer's proffered reasons will, in *all* cases, preclude summary judgment against the plaintiff. The more reasonable interpretation of *Hicks* is the one adopted by the Fifth Circuit. The Fifth Circuit in *Rhodes*, an age discrimination case, correctly explained the appropriate standard for considering motions for summary judgment or judgment as a matter of law in employment discrimination cases:

> In tandem with a prima facie case, the evidence allowing rejection of the employer's proffered reasons will often, perhaps usually, permit a finding of discrimination without additional evidence. Thus, a jury issue will be presented and a plaintiff can avoid summary judgment and judgment as a matter of law if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated

> reasons was what actually motivated the employer and (2) creates a reasonable inference that age was a determinative factor in the actions of which plaintiff complains. The employer, of course, will be entitled to summary judgment if the evidence taken as a whole would not allow a jury to infer that the actual reason for the discharge was discriminatory.

Rhodes, 75 F.3d at 994; *see also Bodenheimer*, 5 F.3d at 957-59. The Fifth Circuit's standard is substantially in line with that of other courts of appeals. *See, e.g., Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, __ F.3d __, 1996 WL 531799, *4-7 (11th Cir. Sept. 19, 1996); *Theard v. Glaxo, Inc.*, 47 F.3d 676, 680 (4th Cir. 1995); *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1958, 131 L. Ed. 2d 850 (1995); *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260-61 n. 3 (1st Cir. 1994); *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 801 (8th Cir. 1994).

The Fifth Circuit's standard does not, as Paulsen apparently suggests, conflict with *Hicks*. By stating that disbelief of the employer's explanation *may* be enough to support a finding of discrimination, *Hicks* also implies that such disbelief *may not* be enough. *See Hicks*, 113 S.Ct. at 2749; *see also Isenbergh*, __ F.3d at __, 1996 WL 531799, *5 (stating that *Hicks* indicates "that disbelief of the employer's proffered reason may (and by implication, may not) be enough for a plaintiff to overcome an employer's motion for judgment as a matter of law"). Properly read, *Hicks* "strongly suggest[s] that rejecting the employer's proffered reason is not always sufficient to allow a finding of discrimination, although sometimes . . . it might be." *Isenbergh*, __ F.3d at __, 1996 WL 531799, *5; *see also Woods*, 30 F.3d at 261 n.3 ("[W]e do not

think that the Supreme Court meant to say that such a finding [of discrimination] would *always* be permissible.").

In *Rhodes*, the Fifth Circuit correctly recognized that there may be cases in which "the evidence put forth by the plaintiff to establish the prima facie case and to rebut the employer's reasons is not substantial," and consequently "a jury cannot reasonably infer discriminatory intent." *Rhodes*, 75 F.3d at 994. *See also* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229, 2308 (1995) ("There may be cases in which the [prima facie case and proof of pretext] goes the plaintiff's way, but a judgment for the plaintiff would still be legally questionable."). Whether or not summary judgment is appropriate will necessarily depend on the evidence in each individual case. *See Rhodes*, 75 F.3d at 994 ("The evidence necessary to support an inference of discrimination will vary from case to case."); *Woods*, 30 F.3d at 261 n.3 ("The strength of the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances. In short, everything depends on the individual facts.").

The interpretation of *Hicks* urged by Paulsen would create a categorical rule that an employer would never be entitled to summary judgment if the evidence is sufficient to allow the jury to disbelieve the employer's explanation for the employment action. Such a rule would in effect be an abrogation of Rule 50 (regarding judgments as a matter of law) and Rule 56 (regarding summary judgments). However, this Court has repeatedly held that courts should not treat discrimination differently from other ultimate questions of fact. *See, e.g.*, *Hicks*, 113 S. Ct. at 2756; *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S. Ct. 1478, 1482, 75 L. Ed. 2d 403 (1983); *see also* Malamud, 93 Mich. L. Rev. at 2305 (stating that "the Court stressed in *Hicks* that once a *McDonnell*

Douglas–Burdine case reaches the pretext stage, it is to be treated like any other civil case"). Paulsen's suggested interpretation of *Hicks* would entirely remove employment discrimination cases from the traditional application of Rule 50 and Rule 56, which would certainly be an unintended result of the *Hicks* opinion. *See Isenbergh*, __ F.3d at __, 1996 WL 531799, *7 ("[W]e are skeptical that the Supreme Court intended to remove an entire category of cases from traditional consideration under Fed.R.Civ.P. 50 or 56."). The more sensible interpretation of *Hicks* is one that preserves the traditional rules applicable to civil cases generally. *See Rhodes*, 75 F.3d at 993 ("[T]he question does not yield a categorical answer. . . . The answer lies in our traditional sufficiency-of-the-evidence analysis."); *Isenbergh*, __ F.3d at __, 1996 WL 531799, *7.

For the reasons set forth above, the Fifth Circuit's decision, requiring Paulsen to create a material fact issue that Beyond's explanation for her discharge was false and that Beyond's true motivation was unlawful discrimination, is consistent with *Hicks* and is not in substantial conflict with decisions of other Courts of Appeals.

B. This case does not merit review because Respondent is entitled to summary judgment even under the standard urged by Petitioner.

Even if the Fifth Circuit were incorrect in requiring Paulsen to create a fact issue that the real reason for her discharge was sex discrimination, Beyond is nonetheless entitled to summary judgment because Paulsen has failed to raise a fact issue that Beyond's articulated reasons for her discharge were false.

Beyond's reasons for discharging Paulsen included: (1) her

failure to attain her sales quotas; (2) her allowing her corporate American Express card to be cancelled for failing to pay the bills; (3) her failure to timely submit weekly expense reports; (4) her failure to accurately and timely submit sales forecasts; (5) her inaccessibility to customers and supervisors; (6) her failure to return telephone calls; and (7) complaints about Paulsen from customers. Beyond presented substantial evidence supporting its nondiscriminatory reasons for discharging Paulsen. Paulsen did not present sufficient evidence to create a factual issue as to the truthfulness of Beyond's articulated reasons for her discharge. Most of the evidence establishing Paulsen's unsatisfactory performance and low sales was not even addressed — much less disputed — by Paulsen. Under any formulation of pretext, Paulsen cannot establish that her discharge was for anything else other than unsatisfactory performance and low sales. Thus, the issue raised by Paulsen in her Petition pertaining to the propriety of the Fifth Circuit's reliance on its decisions in *Bodenheimer* and *Rhodes* is a purely academic one and is not dispositive of this case. Paulsen's Petition should therefore be denied.

CONCLUSION

For the reasons set forth herein, this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

ROBERT E. SHEEDER
Counsel of Record
JASON E. WINFORD
DAVID E. SLOVENSKY
JENKENS & GILCHRIST, P.C.
Attorneys for Respondent
1445 Ross Avenue
Suite 3200
Dallas, Texas 75202
(214) 855-4500

APPENDIX A — RELEVANT REGULATIONS

29 C.F.R. § 1630.2(l)(3) provides as follows:

> *Is regarded as having such an impairment* means:
>
> Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R. § 1630.2(j)(2) provides as follows:

> The following factors should be considered in determining whether an individual is substantially limited in a major life activity:
>
> (i) The nature and severity of the impairment;
>
> (ii) The duration or expected duration of the impairment; and
>
> (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(3) provides as follows:

> With respect to the major life activity of *working*—

Appendix A

(i) The term *substantially limits* means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the

number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).